L. C. Cassidy & Son, Inc. *and* **Chauffeurs, Teamsters, Warehousemen and Helpers Local Union No. 135, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.** Case 25–CA–15367

26 August 1983

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

Upon a charge filed on 16 March 1983 by Chauffeurs, Teamsters, Warehousemen and Helpers Local No. 135, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, and duly served on L. C. Cassidy & Son, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 25, issued a complaint on 23 March 1983, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on 3 February 1983, following a Board election in Case 25–RC–7839, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about 4 March 1983, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On 1 April 1983 Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On 27 April 1983 counsel for the General Counsel filed directly with the Board a "Motion to Strike Portions of Respondent's Answer and Motion for Summary Judgment." Subsequently, on 5 May 1983, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's motions should not be granted. Respondent filed a response to the Notice To Show Cause, and a Motion for Summary Judgment on its own behalf.[2]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion To Strike Portions of Respondent's Answer

Paragraph 1 of the complaint alleges that the original charge was filed by the Union on 16 March 1983, and served on Respondent by certified mail on or about 16 March 1983. In its answer, Respondent contends that it is "without knowledge" as to the allegations contained in paragraph 1 of the complaint, and therefore denies them. Inasmuch as the date of the filing appears on the charge form and proof of service shows that the charge was served on its filing date, 16 March 1983, we grant General Counsel's motion to strike Respondent's answer to paragraph 1 of the complaint.

Paragraph 5(b) of the complaint alleges that the Union was certified by the Board as the exclusive collective-bargaining representative of employees in the appropriate unit described in paragraph 5(a); in its answer, Respondent admits the Union's certification, but contends it was invalid based upon Respondent's objections to the election. Paragraph 5(c) alleges that the Union has been and is now the exclusive representative for the purposes of collective bargaining of employees in the unit described in paragraph 5(a); Respondent's answer denies this allegation of the complaint. Paragraph 5(d) alleges that the Union, by letter, requested Respondent to recognize and negotiate with it as the exclusive bargaining representative of Respondent's employees; Respondent's answer admits the request for bargaining, but denies that the Union is the duly designated exclusive collective-bargaining representative of Respondent's employees. The General Counsel contends that Respondent's answers to the allegations contained in paragraphs 5(b), (c), and (d) should be struck. While, for the reasons stated herein, we find that Respondent's answers to these paragraphs do not present a meritorious defense to the allegations of the complaint, we do not believe they should be struck as they could be viewed as an endeavor by Respondent to preserve its posi-

[1] Official notice is taken of the record in the representation proceeding, Case 25–RC–7839, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

[2] We have duly considered Respondent's Motion for Summary Judgment. Inasmuch as, for reasons stated herein, we grant the General Counsel's Motion for Summary Judgment, we hereby deny Respondent's motion.

tion. See *Rod-Ric Corp.*, 171 NLRB 922 (1968). Accordingly, the General Counsel's motion to strike paragraph 5(c) and portions of paragraphs 5(b) and (d) is denied.

Ruling on the Motion for Summary Judgment

In its answer to the complaint and response to the Notice To Show Cause, Respondent admits its refusal to bargain with the Union, but in substance attacks the validity of the Union's certification on the basis of its objections to the election in the underlying representation proceeding. The General Counsel argues that all material issues have been previously decided. We agree with the General Counsel.

A review of the record herein, including the record in Case 25-RC-7839, reveals that, pursuant to a Stipulation for Certification Upon Consent Election, an election was held among the employees in the stipulated unit. The tally of ballots showed that, of approximately 19 eligible voters, 11 cast valid ballots in favor of, and 6 against, the Union; there were 2 challenged ballots, an insufficient number to affect the results. Thereafter, Respondent filed timely objections to the election, alleging, in essence, that the Union's observer, wearing an official observer's badge, was permitted to leave the polls while the polls were open; that the Union's observer talked to one or more eligible voters outside the polling area prior to their having voted; and that the Board agent conducting the election, in the company of Respondent's observer, left the polling area with the ballot box while the polls were open. Following an investigation, the Regional Director, on 13 October 1982, issued a report in which he recommended that Respondent's objections be overruled and the Union be certified. Thereafter, Respondent timely filed exceptions to the Regional Director's report. On 3 February 1983 the Board issued a Decision and Certification of Representative which adopted the Regional Director's report (not included in volumes of Board Decisions).

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[3]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.[4]

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is, and has been at all times material herein, an Indiana corporation maintaining its principal office and place of business in Indianapolis, Indiana, engaged in the business of sale and installation of residential and apartment building insulation. Respondent, during the 12 months preceding issuance of the complaint, a representative period, in the course and conduct of its operations, derived gross revenues in excess of $500,000, and received at its Indianapolis, Indiana, facility products, goods, and materials valued in excess of $50,000 directly from points outside the State of Indiana.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Chauffeurs, Teamsters, Warehousemen and Helpers Local Union No. 135, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

[3] See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

[4] With respect to Respondent's contention that, in certifying the Union, the Board failed to review all of the evidence submitted to the Regional Director, we note the Board has addressed this issue of the completeness of the record in representation cases in *Frontier Hotel*, 265 NLRB 343 (1982), in which it cited its newly revised regulation, Sec. 102.69(g)(1)(ii) of the Board's Rules and Regulations, providing,

> [T]he record in objections cases where no hearing is held consists of the objections which were filed, the regional director's report or decision, all documentary evidence, except statements of witnesses, relied upon by the regional director in his report or decision, any briefs . . . and any other motions, rulings, or orders of the regional director.
>
> It is clear, therefore, that failure to transmit statements of witnesses to the Board with the record in the representation case does not mean that the record before the Board was incomplete and does not invalidate the subsequent certification. Accordingly, we find without merit this contention of Respondent.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time installers and helpers, mechanics and semi-drivers employed by Respondent at its 1918 South High School Road, Indianapolis, Indiana facility; BUT EXCLUDING all office clerical employees, all professional employees, all sales employees, all supervisors and guards as defined in the Act, and all other employees.

2. The certification

On 3 September 1982 a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 25, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on 3 February 1983, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about 3 March 1983, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about 4 March 1983, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since 4 March 1983, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to ensure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. L. C. Cassidy & Son, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Chauffeurs, Teamsters, Warehousemen and Helpers Local Union No. 135, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time installers and helpers, mechanics and semi-drivers employed by Respondent at its 1918 South High School Road, Indianapolis, Indiana, facility; BUT EXCLUDING all office clerical employees, all professional employees, all sales employees, all supervisors and guards as defined in the Act, and all other employees, constitute a unit appropriate for the

purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since 3 February 1983 the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about 4 March 1983, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, L. C. Cassidy & Son, Inc., Indianapolis, Indiana, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Chauffeurs, Teamsters, Warehousemen and Helpers Local Union No. 135, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All full-time and regular part-time installers and helpers, mechanics and semi-drivers employed by Respondent at its 1918 South High School Road, Indianapolis, Indiana facility; BUT EXCLUDING all office clerical employees, all professional employees, all sales employees, all supervisors and guards as defined in the Act, and all other employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its 1918 South High School Road, Indianapolis, Indiana, facility copies of the attached notice marked "Appendix."[5] Copies of said notice, on forms provided by the Regional Director for Region 25, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 25, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

[5] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Chauffeurs, Teamsters, Warehousemen and Helpers Local Union No. 135, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All full-time and regular part-time installers and helpers, mechanics and semi-drivers employed by us at our 1918 South High School

Road, Indianapolis, Indiana facility; BUT EXCLUDING all office clerical employees, all professional employees, all sales employees, all supervisors and guards as defined in the Act, and all other employees.

L. C. CASSIDY & SON, INC.